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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 529

WILLIAM IRWIN DENNY, ET AL., (Rodney Browne Starr, Plaintiff No. 4.), *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF FOR PETITIONER IN REPLY TO BRIEF OF THE UNITED STATES

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While there is no dispute between the parties as to the actual facts in this case, there is a basic dispute between them with respect to the legal consequences stemming from those facts. Actually, the basic issue is a very narrow one and involves only the determination as to whether or not the petitioner was at the time of his recall to active duty a "retired Navy enlisted man" as respondent contends, or whether he was a Lieutenant (Junior Grade) on the retired list

as provided by the Act of May 7, 1932, *supra*, by virtue of his temporary service as an officer in World War I.

Actually respondent does not discuss this issue other than to state in the footnote appearing on page 10 of its brief that:

> "There is no basis for petitioner's reliance upon the fact that, at the time he was recalled to active duty in 1941, he was a lieutenant (jg.) on the retired list. Contrary to his apparent belief, his rank on the retirement list was only temporary and was to be terminated upon recall to active duty. Act of May 7, 1932, *supra*, pp. 2-3. This statutory directive is reflected by his reentry on active duty as a chief petty officer, and not as a commissioned officer. In short, petitioner's permanent status throughout the period between 1934 (when he first retired) and 1946 was that of chief petty officer. It is also noteworthy that the 1932 Act, under which petitioner initially obtained commissioned status on the retired list, expressly provides that it was not to be used to effect an increase in retired pay."

Respondent's contention overlooks and ignores the actual language of the Act of May 7, 1932, *supra*, as well as the effect of such language. Admittedly, petitioner was not, under the provisions of the Act of May 7, 1932, entitled to serve on active duty as a commissioned officer. However, the Act clearly gave him the status of a lieutenant (jg.) on the retired list and that status was a permanent status on the retired list. Certainly it cannot be contended that if the petitioner had not received a temporary appointment as a commissioned officer after his recall to active duty during World War II, but has served continuously on active duty after recall as a chief petty officer he would not

have, under the provisions of the Act of May 7, 1932, *supra*, been entitled to resume his status as a commissioned officer upon release from active duty after recall. On the contrary it is clear that in such a situation petitioner would have resumed his status as a commissioned officer on the retired list upon his release from active duty. If he had such status as a commissioned officer it is submitted that he would be entitled to the benefits of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, c. 413, 56 Stat. 359, 368, under the re-retirement principle established by the decisions of the Court of Claims in *Carroll* v. *United States*, 117 C. Cls. 53, and *Sherfey* v. *United States*, 141 C. Cls. 305, *cert. den.* 357 U.S. 926. The construction which respondent seeks to place upon the Act of May 7, 1932, results in making the provisions of the Act, for all practical purposes, a complete nullity and effecting no actual change in petitioner's status on the retired list.

The government made essentially the same contention with respect to the advancement of an officer on the retired list under the provisions of the Act of June 23, 1938, c. 598, 52 Stat. 949, as amended, 34 USC 1946 ed. 404(f), which provided:

> "All line officers of the Navy who have been specially commended for their performance of duty in actual combat by the head of the executive department under whose jurisdiction such duty was performed, when retired, except as provided in section 404(h) of this title, shall, upon retirement, be placed upon the retired list with the rank of the next higher grade and with three-fourths of the active-duty pay of the grade in which serving at the time of retirement."

The Court of Claims in *McColl* v. *United States*, 137 C. Cls. 337, held that the 1938 Act, as amended, gave an

officer so advanced a permanent status with the advanced rank on the retired list. The respondent made essentially the same contention with respect to individuals advanced on the retired list by virtue of a temporary appointment under the provisions of the Temporary Promotions Act of July 24, 1941, c. 320, 60 Stat. 28, who were recalled to active duty after such advancement on the retired list and again promoted while serving on active duty during recall. The Court of Claims, in the case of *John J. Queeney, Plaintiff #5* in *Leonard J. Hoag, et al.* v. *United States*, C. Cls. No. 544-59, decided June 7, 1963, held that the rank to which the plaintiff there had been advanced on the retired list was a permanent rank entitling him to the benefits of Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, *supra*, when he was subsequently released from active duty after recall. No reason has been shown why the petitioner did not acquire the same permanent status on the retired list under the provisions of the Act of May 7, 1932, *supra*, as do individuals under the Act of June 23, 1938, *supra*, and the Temporary Promotions Act of 1941, as amended, *supra*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for grant of certiorari should be allowed.

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